



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: Circle, Inc.

File: B-279896

Date: July 29, 1998

Patricia M. Crowley, Esq., Simon, Peragine, Smith & Redfearn, for the protester.
S. Leo Arnold, Esq., Ashley, Ashley & Arnold, for Souter Construction Co., an intervenor.

Karen Da Ponte, Esq., and Lester Edelman, Esq., Department of the Army, for the agency.

Marie Penny Ahearn, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly denied firm's request for upward correction of mistaken bid is denied where agency reasonably found that discrepancies in the worksheets, as well as other evidence provided, did not establish intended bid.

DECISION

Circle, Inc. protests the denial of its request for upward correction of its low bid under invitation for bids (IFB) No. DACW29-98-B-0021, issued by the United States Army Corps of Engineers for construction of a railroad bridge and associated work involved in flood control in St. Charles Parish, Louisiana.

We deny the protest.

Circle submitted the low bid of \$5,793,966. Agency Report (Rpt.) Exhibit (Exh.) 3. Souter Construction Company submitted the second low bid of \$6,846,330. Id. By letter dated January 26, 1998, the contracting officer notified Circle that the firm's bid was "lower than the Government Estimate (without profit) of \$5,927,169.68 and [was] considerably lower than that of the other bids received." Rpt. Exh. 12. The letter requested that Circle "review [its] bid and specifications to ensure you understand what is required," with "[p]articular attention . . . called to [line] item [No.] 0019," for removal of a railroad detour. Circle bid "-0-" for that item. Id.

Circle responded by notarized letter of January 28 from its president that the firm had made mistakes in a number of bid items, and requested an upward correction in the amount of \$677,997.60 (from \$5,793,966 to \$6,471,963.60). Rpt. Exh. 5. The firm claimed that labor and material costs had been omitted in line item No. 0019 and that a formula error in the markup of subcontractor bids occurred in line item Nos. 0009-0013, 0017-0018, and 0025-0027 with the use of [deleted] percent instead of [deleted] percent. Id. Additionally, the firm claimed that in line item No. 0003, the cost of a crane was included in only one work shift rather than two, as intended, and that standby time for the crane had been inadvertently omitted. Circle enclosed with its letter 35 bid preparation worksheets, one for each line item; spreadsheets for the original bid and alleged intended bid; and several subcontractor quotes. Id. The firm did not submit any sworn affidavits from employees who prepared the worksheets or bid form.

After reviewing Circle's submission, the agency concluded that, although the firm provided reasonable evidence to show that a mistake had been made in line item No. 0003,¹ the submitted worksheets and notarized letter did not clearly and convincingly show mistakes or the intended prices on the other line items, based on discrepancies and inconsistencies among the bid preparation documents.² Rpt. Exh. 5 at 7. Consequently, the agency concluded there was insufficient proof of the alleged intended bid to justify correction. Id.

By letter dated April 14, the agency informed Circle that the firm would not be permitted to correct its bid, but would be allowed to withdraw it. Rpt. Exh. 4. The agency submitted to Circle a detailed written analysis of the basis for denying

¹On line item No. 0003, the agency determined that it was reasonable to assume that Circle's calculations based on one 10-hour shift rather than two 8-hour shifts per day was a mistake, because it was not likely that the job could be completed using one 10-hour shift. Rpt. Exh. 5 at 4. It further determined, however, that the evidence Circle submitted for this line item--a worksheet which contained notations added after bid opening--did not constitute original evidence of an otherwise intended bid, and thus was insufficient to establish Circle's intended bid. Rpt. Exh. 5 at 7.

²Generally, in this regard, the agency determined that the figures in the bid preparation worksheets did not correlate with the alleged mistaken line items in the intended bid spreadsheet, the worksheets contained no explanation for the difference between the figures in the bid total column of the intended bid spreadsheet and those in the original bid spreadsheet, and there was no evidence submitted such as employee affidavits to establish the alleged mistakes that caused the original bid to be submitted. Rpt. Exh. 5.

correction on each line item and listed the most notable factors militating against correction as follows:

[1.] The worksheet for Bid Item 19 contains some costs for labor and materials, but it is not clear that Circle ever intended to bid this item as anything other than a no cost bid. The worksheet does not reflect all the subcontractor credits which may be realized, and it is not clear why a \$93,000 credit was used, rather than one or more of the credits proposed in the subcontractor quotes.

[2.] [The] [w]orksheet . . . for Bid Item No. 3, contains markings added after bid opening, which detract from its credibility. The worksheet clearly called for one 10-hour shift . . . and did not call for standby time.

[3.] No original calculations were furnished showing how markups were applied to the bid items where markup errors are alleged, and there is no pre-bid evidence showing the intended markup for "subcontractor" items. Our own calculations of markups generally do not support either the alleged mistakes or the intended bid. Many of the so-called "subcontractor" bid items appear to be contractor performed items.

[4.] In general, the bid documents are not easy to follow or understand. Also, Circle's letter requesting correction of the alleged mistakes does not adequately explain how the subcontractor quotations were used in preparing the bid.

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[5.] Circle's submission does not meet all of [the Army Corps of Engineers Federal Acquisition Regulation Supplement (EFARS) § 14.407-3(g)(S-100)] requirements [for sworn affidavits as to the mistake and the authenticity of the working papers used to compute the bid]. The only affidavit submitted is the notarized letter signed by [Circle's president]. There is no information on who prepared the worksheets or the bid.

Rpt. Exh. 5 at 6.

By letter dated April 24, Circle requested that the Army reconsider its decision and enclosed new documentary evidence, including a spreadsheet, a subcontractor quote for a number of line items, and three sworn affidavits. Rpt. Exh. 6. On the same day, Circle filed this protest with our Office. Rpt. Exh. 1.

A low bidder's request for upward correction of its bid before award may be granted only where the request is supported by clear and convincing evidence of both the mistake and the intended bid. Federal Acquisition Regulation (FAR) § 14.407-3(a). Whether the evidence meets the clear and convincing standard is a question of fact, and our Office will not question an agency's decision unless it lacks a reasonable basis. Apache Enters., Inc., B-255943, B-255943.2, Apr. 20, 1994, 94-1 CPD ¶ 270 at 5.

The Army's decision to disallow correction was reasonable. In its report on the protest, the agency has provided a detailed explanation as to precisely why correction of the bid is not warranted. In its comments on the report, Circle has failed to rebut the agency's determination with regard to any of the specific line items. We have reviewed the report, as well as the information submitted by Circle, and agree with the Army's analysis--even ignoring the question of whether there is sufficient evidence to support the existence of the numerous alleged mistakes, the worksheets and other evidence generally do not contain clear and convincing evidence as to the intended prices for the items in question, such that correction would be warranted.

For example, regarding Circle's alleged mistake in markup (which affected 10 of the 12 allegedly mistaken line items), the agency not only found no evidence supporting Circle's contention that it had mistakenly applied a [deleted]-percent rather than a [deleted]-percent markup to subcontractor costs, but found that the worksheets contained amounts that were inconsistent with amounts stated elsewhere.³ Rpt. Exh. 5. As a specific example, for line item No. 0025, a lump-sum item for precast concrete girders, Circle's worksheet entry showed a direct cost of [deleted], but a subcontractor quote, submitted with the firm's correction request, showed a price of [deleted] and yet another subcontractor quote submitted with the firm's agency reconsideration request, showed a price of [deleted] for the item.⁴ Rpt. Exh. 5 and Reconsideration Request, dated April 24, 1998 (as submitted for record by Circle). More importantly, while the total bid amount for this item was [deleted]--which is [deleted] percent greater than the [deleted] subcontractor quote--the agency found, and our review has confirmed, that there is no evidence in the worksheets, or other contemporaneous documentation, that Circle actually intended a [deleted]-percent rate (or, for that matter, any rate other than [deleted] percent) at the time it

³Indeed, the agency was able to confirm the use of a [deleted]-percent markup for only 2 of the 10 line items (Nos. 0017 and 0018). Even for these items, however, the agency found no evidence that the [deleted]-percent markup was applied by mistake, or that the firm intended to apply some other rate. Rpt. Exh. 5 at 3.

⁴Circle's request for correction also included an "abstract of bids" computer spreadsheet, which listed 10 bids from subcontractors for line item No. 25 ranging from [deleted] to [deleted]. Rpt. Exh. 5.

prepared its bid. Although Circle explained in an affidavit (submitted for the first time in connection with the agency reconsideration request) that the mistake resulted from a misunderstanding by clerical staff--instead of [deleted] the standard [deleted]-percent markup by [deleted]-percent for subcontractor items and applying a [deleted]-percent rate, as allegedly directed, they applied a [deleted]-percent rate--this explanation was not supported by any worksheet entries, or even by affidavits from the clerical staff involved. Rpt. Exh. 6, Hines Affidavit at 4. There is nothing unreasonable in an agency's refusal to accept uncorroborated, self-serving statements as the basis for permitting an upward correction. Thus, the agency properly concluded that there was no clear and convincing evidence that Circle intended to apply a markup greater than [deleted] percent.

In its comments on the agency's report--which, again, do not address any of the agency's specific explanations--Circle focuses on the agency's reference to Circle's failure to submit sworn affidavits as a reason for denying the correction. Comments at 2, 3. However, as discussed, the agency ultimately considered Circle's later-furnished affidavits, and found that they were not sufficient to overcome the other evidentiary deficiencies. It is clear from the record, moreover, that even the Army's original determination principally was based, not on the lack of affidavits, but on the insufficiency of the evidence as a whole.⁵

Finally, contrary to the protester's additional contention, the circumstances of this case do not present a narrow range of uncertainty regarding the intended bid under which correction would be permissible, because Circle has failed to establish any intended bid, even within such a range. Cf. ACS Constr. Co., Inc. of Miss., B-257775, Nov. 9, 1994, 94-2 CPD ¶ 179 (where the agency determined that clear and convincing evidence established the existence of a mistake, the intended bid price with a narrow range of uncertainty, and the corrected bid remained low as corrected).

The protest is denied.

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⁵The protester also has failed to rebut the agency's further position that the firm's later-submitted documents are largely irrelevant to the question before our Office, which is whether the agency's denial of the request for bid correction had a reasonable basis in the record before the agency at the time, and that a tardy production of a critical document raises credibility concerns as well as doubts about the good order of the workpapers. See Pueblo Enters. Inc., B-278279, Jan. 14, 1998, 98-1 CPD ¶ 15 at 5 n.2.